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FURTHER PROMOTION AND ENCOURAGEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS INCLUDING THE QUESTION OF THE PROGRAMME AND METHODS OF WORK OF THE COMMISSION

QUESTIONS OF HUMAN RIGHTS, MASS EXODUSES AND DISPLACED PERSONS

Report of the Representative of the Secretary-General
Mr. Francis Deng, submitted pursuant to Commission on
Human Rights resolution 1997/39

Addendum

Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement

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Introduction

1. In his report to the Commission on Human Rights at its fifty-first session the Representative submitted a compilation and analysis of legal norms relevant to the protection of internally displaced persons (E/CN.4/1996/52/Add.2, hereafter Compilation and Analysis of Legal Norms). The Compilation and Analysis focused on the guarantees relevant to internally displaced persons, i.e. for the situation of such persons during displacement and return. It also noted that it was necessary to discuss the legal norms relevant to the protection from displacement and to a right not to be displaced, in order to achieve comprehensiveness in the elaboration of the legal framework that relates to displacement. Although certain chapters of that report mentioned these issues, it was decided to undertake a detailed analysis in a separate study. The present report contains the results of that study. It builds heavily on, and makes frequent references to, the Compilation and Analysis of Legal Norms and should be read in conjunction with it. Together with the Compilation and Analysis, it formed the basis for the preparation of guiding principles providing protection in all phases of internal displacement: protection from displacement, during displacement and in the period of return and reintegration. These Guiding Principles on Internal Displacement are presently before the Commission (E/CN.4/1998/53/Add.2).

2. The Compilation and Analysis, this study and the guiding principles were prepared under the direction of the Representative by a team of experts in international law. This study was prepared by Maria Stavropoulou (Greece) as a pro bono consultant in 1996 and reviewed by legal experts in Geneva, including Robert K. Goldman (United States of America), Walter Kälin (Switzerland), Manfred Nowak (Austria), Daniel Helle of the Office of the United Nations High Commissioner for Human Rights (OHCHR), Jean-François Durieux of the Office of the United Nations High Commissioner for Refugees (UNHCR) and Toni Pfanner and Jean-Philippe Lavoyer of the International Committee of the Red Cross (ICRC) in October 1996 and April 1997. The contributions of international humanitarian agencies, as well as the Brookings Institution - Refugee Policy Group Project on Internal Displacement should also be acknowledged.

3. Forced displacement as understood in this paper involves policies that have the purpose or the effect of compelling people to leave their home and place of habitual residence, including in some cases relocating them to another area of the country, against their will. The absence of such will or consent implies that there is a certain amount of coercion. The relevant question then is whether such coercion is lawful. If a real choice exists for the persons concerned as to whether to leave or not, in other words, if they could reasonably be expected to choose to remain in their home areas, their movement is voluntary. The same applies to situations where the movement is undertaken with the genuine and informed consent of the persons concerned. 1/

4. Forced removal from one's home and home area and relocation to another area of the country may be based on legitimate grounds and undertaken in accordance with international and domestic law. In other cases, however, they may not be compatible with international law and will be arbitrary. In principle, four different types of such violations are identifiable: First,

the eviction or displacement of persons is unlawful if it is based on grounds not permissible under international law. This aspect of the right not to be arbitrarily displaced implicitly derives from the rights to freedom of movement and residence, to the inviolability of the home and to housing. Second, a violation might occur if minimum procedural guarantees are not complied with. Third, the manner in which an eviction is carried out may violate other human rights such as personal liberty, freedom from torture, inhuman and degrading treatment or even the right to life. Finally, the effects of evictions and displacement may have a negative impact on the enjoyment of other human rights, in which case the State is required to take measures to respond to the concerns that arise, in accordance with its obligations under international law, as defined in the Compilation and Analysis of Legal Norms.

5. In many cases the State will be responsible for and actively involved in carrying out displacement policies. In other cases the State may condone, tolerate or acquiesce to such policies and its role may be more difficult to discern. However, even in cases where the precise role of the State is unclear, the effect of such policies and their consequences for the enjoyment of human rights will be sufficient to determine the legality or illegality of the forced movement and the obligations of the State concerned vis-à-vis the persons so moved (displaced). Where it is determined that the forced removal of people is a result of (active or passive) State policy and is illegal, questions of State responsibility arise.

6. In addition, where forced movement has the purpose or effect of genocide, torture, inhuman or degrading treatment, slavery, or systematic discrimination (e.g. apartheid), it could entail individual criminal responsibility of the perpetrators under international law. In this context the responsibility of non-State actors insofar as they carry out displacement must also be examined.

7. This study briefly examines the general international legal context in which States have obligations under international law not to arbitrarily displace persons under their jurisdiction. It also examines in detail the specific legal provisions relating to forced displacement found in international human rights and humanitarian law, including the grounds justifying displacement and the conditions under which it can be lawfully carried out. Finally, the study discusses the specific protections afforded to indigenous peoples in cases of displacement.

I. THE GENERAL INTERNATIONAL LEGAL CONTEXT

8. Prevention of displacement is inherent in respect for human rights and international humanitarian law. As the General Assembly and the Commission on Human Rights have frequently emphasized, many situations of displacement could be avoided or minimized if international law were adequately adhered to. 2/ The efforts to identify the causes of displacement and focus on the responsibility of the State concerned, as well as on remedies, have increased in recent years, as internal conflicts have proliferated, become more complex and protracted, and often threaten international peace and security. While internal displacement is in most cases the direct result of generalized violence and armed conflict, the weakness of States, the inadequate

functioning of political and judicial organs, ethnic tensions, as well as poverty and environmental degradation are all implicated. The enjoyment of civil, political, economic, social and cultural rights is invariably jeopardized in such circumstances, as the State fails to defend its citizens against their violation, or itself violates their rights. State responsibility in the context of displacement is relevant to prevention, as much as to the protection and assistance of those already displaced, and the search for lasting solutions.

A. Violence and threats affecting life and personal security

9. Loss of life, brutality, violence and threats thereof that create a climate of insecurity frequently force people to flee their homes: for instance, in cases of direct or indiscriminate attacks on civilian sites. In fact, violence and threats affecting life and personal security are a particularly effective and frequently used means of inducing displacement and are often also employed in the course of displacement. In some cases the forced movement of persons may amount to genocide, including "ethnic cleansing", or to inhuman and degrading treatment.

10. The right to life is the most fundamental human right, obliging the State not only to abstain from violating it, but also to protect it. Many human rights derive from or relate to the right to life, such as subsistence rights, including the right to food and health, and therefore should be viewed in conjunction with this right. The Compilation and Analysis of Legal Norms (paras. 66-142) presents a comprehensive analysis of the right to life as applicable and relevant to internally displaced persons, which is also relevant in the context of protection from displacement. In this context it should be noted that the use of chemical and biological weapons which may cause the displacement of great numbers of persons is clearly prohibited under customary 3/ and conventional 4/ international law.

B. Discrimination

11. Systematic patterns of discriminatory treatment in the enjoyment of civil, political, economic, social and cultural rights, discrimination against persons belonging to minorities or indigenous peoples and discriminatory economic or social policies are often responsible for forced movements of persons.

12. The prohibition of discrimination, however, appears in most human rights conventions and declarations, either in the form of non-discrimination clauses or equal protection clauses, as discussed in the Compilation and Analysis of Legal Norms (paras. 48-57). In addition, certain provisions such as those found in article 26 of the International Covenant on Civil and Political Rights (ICCPR) guarantee equality before the law and freedom from discrimination in the equal protection of the law in general. 5/ These "govern the exercise of all rights, whether protected under the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction ...". 6/

13. Although not many of these instruments define "discrimination", the term is commonly understood to imply any distinction, exclusion, restriction or

preference which is based on any specified ground, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. 7/ Not every distinction, however, constitutes discrimination, only those that are not based on reasonable and objective criteria. 8/

C. Implantation of settlers

14. A particularly serious form of discrimination is the implantation or establishment of settlers. Implanting settlers or allowing them to settle in a territory, including occupied territory, or transferring a more "compliant" population for military objectives (to maintain better control, to discourage insurgent activity, etc.) and non-military objectives (demographic manipulation, future annexation, etc.) is a form of population movement which may cause, or may be caused by, discriminatory practices, and may, in consequence, result in internal displacement. The settlers may themselves be internally displaced, if settled in an area other than their own against their will.

15. The implantation of settlers will violate the principle of non-discrimination where the settlers receive preferential treatment vis-à-vis the population into whose territory they move and where this results in institutionalized discrimination against the affected population.

16. International humanitarian law contains explicit prohibitions against the implantation of settlers. Article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereafter Fourth Geneva Convention) in article 49 expressly stipulates that the Occupying Power "shall not deport or transfer parts of its own civilian population into the territory it occupies". 9/ In the case that the evacuation of the (protected) population from occupied territory by the Occupying Power is necessary (i.e. if the security or imperative military reasons so demand), paragraph 2 of article 49 expressly requires that this population be brought back to their homes after the end of the hostilities. "Settlement" of protected persons in another part of the territory by means of evacuation is thus prohibited. Furthermore, article 85 (4) (a) of Protocol I typifies the wilful "transfer by the Occupying Power of parts of its own civilian population into the territory it occupies ..." as a grave breach of the Protocol. 10/

D. Evictions and loss of land and housing

17. People may become displaced because their land or other real property is confiscated or expropriated, or they may, de facto or de lege, lose the possibility of using the land or property in question, for instance due to military attacks, conflicts over land, or poorly planned and executed development projects that render an area uninhabitable. In other cases, traditional forms of ownership and use of land may not be recognized by a State's legal system, leading to loss of tenure and landlessness.

18. The Compilation and Analysis of Legal Norms (paras. 270-283) analyses the protections of property available in universal and regional human rights law and international humanitarian law. As mentioned there (para. 274), the individual's right to own, possess and/or use private property is not

absolute. It may be subject to certain interests of society as provided by law and/or to such limitations as "the just requirements of morality, public order and the general welfare in a democratic society". 11/ States are entitled in such instances to take private property for public purposes, according to the doctrine of "eminent domain" or other similar institutions.

19. Nevertheless, in addition to being in conformity with the law and undertaken in the interest of society, expropriation and confiscation cannot be imposed arbitrarily and must be made use of only exceptionally and subject to all applicable human rights standards. Particular restrictions on the State's power to proceed with expropriation and confiscation may apply in the case of persons greatly affected by loss of their land, such as peasants or indigenous peoples. Where subsistence and cultural values are threatened, persons at risk of displacement are entitled to additional human rights protections. 12/

E. Negative impact of development projects

20. Development projects often contribute in significant ways to the realization of economic, social and other human rights. However, there is growing awareness that development projects and their impact on land tenure and on the natural environment may have negative consequences on the enjoyment of human rights that need to be addressed. The World Bank and other international financial institutions have recognized that in the case of evictions and relocation or resettlement undertaken to facilitate development projects, such as the building of dams, roads and airports, the feasibility, necessity and proportionality of the project to the goals to be achieved must be examined and provision for the compensation, resettlement and rehabilitation of the displaced must be made prior to its commencement. The World Bank has issued guidelines relating to involuntary resettlement specifying in detail these norms. 13/ The guidelines marked an important step in formulating requirements for projects that might lead to displacement. 14/

21. Regarding resettlement in other areas, the World Bank guidelines require the community participation both of those to be settled elsewhere because of development projects that uproot them and of the host community. The guidelines recognize their involvement as critical and point out a number of practical measures to be implemented: cooperation with local NGOs that can provide assistance and ensure community participation, regular meetings between project officials and communities, provision of adequate information and provision of compensation to the host communities for land or other assets provided to the resettlers.

22. Furthermore, the World Bank guidelines recommend the following with regard to the expropriation of property, resettlement and compensation: Where resettlement is unavoidable, the identification of several possible relocation sites and their demarcation are necessary prior to the commencement of resettlement. For land-based resettlement, the new site's productive potential and locational advantages should be at least equivalent to the old site. For urban resettlers, the new site should ensure, inter alia, comparable access to employment, infrastructure, services and production opportunities. The conditions and services in host communities should

improve, or at least not deteriorate: improved education, water, health and production services to both groups fosters a better social climate for their integration and in the long run prevents conflicts.

23. In addition, it is recognized that valuation of lost assets and payment of compensation involves a number of measures, such as publicizing among people to be displaced the laws and regulations of valuation and compensation; developing mechanisms to prevent illegal encroaches and squatters; establishing access to resources and earning opportunities that are culturally acceptable and equivalent to those prior to displacement. The guidelines recognize as vulnerable groups at particular risk the indigenous, the landless and semi-landless, and households headed by females who may not be protected through national land compensation legislation.

24. Furthermore, development projects must be designed in such a way as to minimize any negative impact on the environment and consequent loss or degradation of property, by ensuring that such projects are environmentally sound and sustainable. 15/

25. In the case of international financial institutions and corporations, the Committee on Economic, Social and Cultural Rights has stated that "international agencies should scrupulously avoid involvement in projects which, for example ... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation ... . Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account". 16/

F. Damage to the environment

26. Large-scale damage to the environment often causes or compounds forced movements of persons. Such damage may result from scorched-earth tactics, nuclear tests, unsafe industrial projects, submergence caused by the building of dams, chemical or radiation leaks or the movement of hazardous waste.

27. International environmental law increasingly regulates human activities that threaten environmental sustainability or cause environmental damage. Such is the case with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Convention on Long-Range Transboundary Air Pollution, the Vienna Convention for the Protection of the Ozone Layer, the Convention on Environmental Impact Assessment in a Transboundary Context, the United Nations Framework Convention on Climate Change and the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa.

28. With regard to international humanitarian law, article 35, paragraph 3, of Protocol I provides that "[i]t is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the environment", while article 55, paragraph 1, provides that "[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a

prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population". 17/

G. Obligations of non-State actors

29. Displacement is a phenomenon in which actors other than the State, or in addition to it, may also be involved. In situations of armed conflicts these are usually armed opposition groups and paramilitary groups; 18/ in other situations they may be drug traffickers; in still other situations, they may be corporations that are involved in large-scale projects, or landlords. 19/

30. Abuses committed by non-State actors generally do not entail the responsibility of the States under human rights treaties, unless they are instigated, encouraged or at least acquiesced to by the Government concerned; otherwise they are typically labelled as infractions of a country's domestic laws. In such cases, the State is expected to take measures, to the best of its ability, to prevent further displacement, to alleviate the plight of the displaced and to bring those responsible to justice. If such abuses comprise war crimes or crimes against humanity, including grave breaches of international humanitarian law and the crimes of genocide and apartheid, they could entail individual criminal responsibility of the perpetrators under international law.

31. In addition, international humanitarian law deals with armed opposition groups in the case of armed conflicts in common article 3 to the Geneva Conventions and Protocol II. Common article 3 to the Geneva Conventions applies to all parties to a non-international armed conflict and obliges them at a minimum to respect the basic principles of humane treatment. A number of criteria have been proposed to distinguish the types of actors and conflicts to which common article 3 is applicable, as discussed in the Compilation and Analysis of Legal Norms (para. 39). 20/

32. Furthermore, Protocol II applies to non-international armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

II. LAW RELATING TO FORCED DISPLACEMENT

33. Few express international legal norms exist which protect people against individual or collective eviction and displacement or transfer from one region to another within their own country. However, if pieced together, these point to a general rule according to which forced displacement may not be effected in a discriminatory way nor arbitrarily imposed. The present section examines these provisions.

A. Freedom of movement and choice of residence

34. Forced displacement is the denial of the exercise of freedom of movement and choice of residence, since it deprives a person of the choice of moving or

not and of choosing where to reside. Under existing law, therefore, protection against individual or collective internal transfers is inferred, inter alia, from the right to freedom of movement and choice of residence. This freedom is expressly recognized as a human right in article 13 (1) of the Universal Declaration 21/ and is similarly guaranteed in article 12 (1) of the ICCPR which reads:

> "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

35. Similar guarantees are contained in regional instruments - for example, in article VIII of the American Declaration, article 22 (1) of the American Convention, article 2 (1) of the Protocol No. 4 to the European Convention, 22/ and article 12 (1) of the African Charter. 23/

36. Furthermore, forced relocation to a particular area following removal, including in the context of "villagization programmes" or "banishment", may amount to arbitrary detention, in addition to an infringement of freedom of movement.

37. Most universal and regional human rights instruments permit States to place restrictions on freedom of residence and movement during situations of tensions and disturbances, or during disasters. These restrictions may permit certain, limited forced movement of persons or their settlement in other areas. Article 12 (3) of the ICCPR provides that the freedom of movement and choice of residence

> "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

38. Articles 22 (3) and (4) of the American Convention, article 12 (2) of the African Charter and article 2 (3) and (4) of the Protocol No. 4 to the European Convention also set forth the requirements and criteria for validly restricting the otherwise free exercise of this right. Article 22 (3) of the American Convention allows restrictions "only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others". Under paragraph 4 of this article, the exercise of the right to move about and reside in a country may also be restricted "by law in designated zones for reasons of public interest". The Protocol No. 4 to the European Convention, in article 2 (3), provides that "[n]o restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

39. The application of such restrictions must be prescribed by law, based on one of the enumerated grounds justifying limitations, respond to a pressing public or social need, pursue a legitimate aim, and be proportionate to that aim. 24/

40. In the case of article 12 (3) of the ICCPR it has been suggested that restrictions to freedom of movement and choice of residence must be set down by a legislative body. 25/ In this sense the "law" must be accessible to all those subject to it, and must have an adequate degree of certainty. 26/ Furthermore, any restrictions must be "consistent with the other rights" in the ICCPR. So, for instance, banishment within the State's territory is only permissible as punishment when it is imposed in conformity with the guarantees in criminal proceedings set down in articles 14 and 15 of the ICCPR. 27/ The right to an effective remedy is also of relevance here.

41. In addition, article 12 (3) of the ICCPR requires that such restrictions be necessary. A restriction is consistent with the legal proviso in article 12 (3) when it is necessary for achieving one of the listed purposes for interference. Despite the broad discretion accorded the national legislature, the requirement of necessity is subject to an objective minimum standard. 28/ The decisive criterion for evaluating whether this standard has been observed is the principle of proportionality in the given case. Every interference thus requires a precise balancing between the right to freedom of movement and those interests to be protected by the interference. 29/ Finally, restrictions on Covenant rights are always exceptions and may therefore not become the rule. 30/

42. The permissible reasons for interference under article 12 (3) of the ICCPR are "national security", "public order (ordre public)", "public health", "public morals", and the "rights and freedoms of others". National security is endangered only in grave cases of political or military threat to the entire nation, so that persons may have to be temporarily relocated in such situations. Permissible restrictions on freedom of internal movement and residence on the ground of public order (ordre public) 31/ that could exceptionally justify displacement may include cases of development and infrastructure projects where the interests of the general welfare are clearly overriding. The "public health" exception might include relocation away from areas where acute health dangers exist (e.g. areas contaminated as a result of a catastrophe). 32/ Finally, restrictions on freedom of movement and residence imposed in the interest of "the rights and freedoms of others" may justify evictions to respect private property. However, States parties are obligated to ensure that interference in favour of private owners is proportional, i.e. remains at a level that the public can tolerate. 33/ Any interference must be reasonable and objective and non-discriminatory. 34/

43. The question of coerced displacement as it relates to freedom of movement is addressed in a number of initiatives of the United Nations. The Sub-Commission, in a noteworthy resolution, 1994/24 of 26 August 1994, adopted at its forty-sixth session, entitled "The right to freedom of movement",

"Affirms the right of persons to remain in their own homes, on their own lands and in their own countries,

"...

"Urges Governments and other actors involved to do everything possible in order to cease at once all practices of forced displacement, population transfer and 'ethnic cleansing' in violation of international legal standards;".

44. In addition, various regional conferences have reaffirmed the right to freedom of movement and its application in situations of displacement. 35/

45. The draft code of crimes against the peace and security of mankind, in the text adopted at the second reading in 1996, 36/ in article 18, entitled "Crimes against humanity", enumerates 11 manifestations of practices constituting crimes, when committed in a systematic manner or on a large scale, one of them being "... forcible transfer of population". 37/

B. Protection from interference with one's home

46. In addition to freedom of movement and residence and protection against arbitrary internal exile or banishment, provisions relating to privacy also protect from arbitrary displacement. Article 17 of the ICCPR provides that:

"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation (emphasis added).

"2. Everyone has the right to the protection of the law against such interference or attacks."

The protection of "home" relates not only to dwellings but also to all types of residential property regardless of legal title or nature of use. 38/ An invasion of this sphere without the consent of the individual affected represents interference, 39/ as does any activity that deprives one of his/her home.

47. Similar protections are found in article IX of the American Declaration, article 11 of the American Convention, and article 8 of the European Convention. 40/

48. Any interference will be "unlawful" if it contravenes the national or international legal system. In addition, it will be "arbitrary" if it contains elements of injustice, unpredictability and unreasonableness. 41/ In evaluating whether interference with privacy by a State enforcement organ represents a violation of article 17, it must be especially reviewed whether, in addition to conformity with national law, the specific act of enforcement had a purpose that seemed legitimate on the basis of the Covenant in its entirety, whether it was predictable in the sense of rule of law and whether it was reasonable (proportional) in relation to the purpose to be achieved, as emphasized by the Human Rights Committee in its General Comment

No. 16 (32). 42/ A decision to make use of such authorized interference must be made only by the authority designated under the law and on a case-by-case basis.

49. In addition to avoiding the violation of the rights guaranteed in the ICCPR, States have an obligation to take legal and other measures necessary to give effect to these rights by virtue of article 1 (2) of the ICCPR, and to provide the possibility of an effective remedy when these rights are violated (ICCPR 2 (3)). By virtue of the second paragraph of article 17 of the ICCPR, States parties assume a specific duty to protect the right to privacy enshrined in the first paragraph, including against interference by private parties. "Protection of the law" calls for relevant measures in the area of private and administrative law and for a minimum of prohibitive norms under criminal law. Duties to provide corresponding judicial, administrative or other measures may be inferred from article 2, paragraphs (1) and (2). 43/

C. Right to housing

50. The right to housing also provides protection against arbitrary displacement. In addressing this right under article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Committee on Economic, Social and Cultural Rights stated that "instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law". 44/ Limitations of the right to housing must comply with the requirements of article 4 of the ICESCR, 45/ namely that these limitations must be determined by law only insofar as these may be compatible with the nature of the right and solely for the purpose of promoting the general welfare in a democratic society. Evictions may also not contravene the basic principle of procedural due process. Therefore, in the case of collective evictions, a certain amount of arbitrariness may be presumed to exist.

51. Furthermore, article I (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity defines "eviction by armed attack" to be a crime against humanity, whether committed in peace or in war. 46/

52. Resolutions adopted by the Sub-Commission and the Commission on "forced evictions" have recommended that Governments undertake policy and legislative measures aimed at curtailing the practice of forced evictions, including the conferral of legal security of tenure, on the basis of effective consultations with affected persons and groups. 47/

D. Prohibition of forced movement in emergencies, including situations of armed conflict

53. The right to freedom of movement and the protection of privacy are stipulated, under human rights law, to be derogable. Accordingly, population movements may be undertaken during genuine public emergencies, such as armed conflicts, severe communal or ethnic violence, and natural or human-made disasters. These, however, must be "strictly required by the exigencies of the situation" and must not be inconsistent with other State obligations under

international law or involve invidious discrimination. 48/ Even in such cases, therefore, the forced movement must not violate non-derogable human rights. 49/

54. Relevant principles of protection related to forced relocation in the circumstances of derogation, as applied by the Inter-American Commission on Human Rights in the Miskito case, 50/ may be deduced as follows: (a) official proclamation of a state of emergency has to be communicated effectively to avoid terror and confusion when it involves relocation; (b) relocation should be proportionate to the danger, degree and duration of a state of emergency; (c) relocation must last only for the duration of an emergency. Consequently, there is a right of return of a displaced population to their original land, if they so desire, following termination of an emergency situation. 51/

55. During armed conflicts, international humanitarian law 52/ also protects persons from being arbitrarily displaced. Consistent with the general purpose of sparing civilians from the effects of hostilities, as expressed, inter alia, in article 51 of Protocol I and article 13 of Protocol II, the relevant instruments contain several protections from forced displacement.

56. In the case of non-international armed conflicts, article 17 of Protocol II, entitled "Prohibition of forced movement of civilians", explicitly deals with this issue. It stipulates that:

> "1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
>
> "2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."

This wording makes clear that article 17 prohibits, as a general rule, the forced movement or displacement of civilians during internal hostilities. 53/ "The article does not, of course, restrict the right of civilians to move about freely within the country, subject to any restrictions that may be imposed by the circumstances, or to go abroad". 54/ The forced displacement of civilians is prohibited unless the party to the conflict were to show that (a) the security of the population or (b) a meticulous assessment of the military circumstances so demands. 55/ Clearly, imperative military reasons cannot be justified by political motives, such as the movement of population in order to exercise more effective control over a dissident ethnic group. 56/ Accordingly, the burden is squarely on the party initiating such action to justify it under the narrow exceptions to this rule.

57. In addition to being allowed only in exceptional instances, forced movements must also be undertaken only after "all possible measures" have been taken to ensure satisfactory conditions of shelter, hygiene, health, safety and nutrition for the civilian population. The reference to "all possible measures" takes into account the fact that there might be practical

difficulties, but even so it does not reduce the effect of the obligation in any way. Furthermore, no excuse for unsatisfactory conditions may be invoked if the displacement was not a matter of utmost urgency and could have been foreseen.

58. Article 4 (3) (e) of Protocol II further provides for the removal of children from hostilities with the consent of a parent or guardian whenever possible. Such removal must be temporary and within the country.

59. In the case of inter-State armed conflicts, article 49 of the Fourth Geneva Convention elaborates on the movement of protected persons 57/ in the case of occupation. Paragraph 1 of this article prohibits the forcible transfer of the individual or mass forcible transfers regardless of their motive.

60. The second paragraph of article 49 states that, "[n]evertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand". If either the security of the population does not demand relocation, or the military reasons are not imperative, 58/ the evacuation is not legitimate. Furthermore, "[s]uch evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement". Thus, as a rule, evacuation must be to reception centres inside the territory. Finally, protected persons who have been evacuated are to be brought back to their homes as soon as the hostilities in the area of origin have ended.

61. Paragraph 3 of article 49 of the Fourth Geneva Convention stipulates the conditions under which evacuations can be undertaken, by providing that:

> "The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated."

This wording is intended to cover the contingency of an improvised evacuation of a temporary character when urgent action is absolutely necessary, not to deflect from the obligation of the Occupying Power to mitigate as far as possible the unfortunate consequences of evacuation. 59/ In addition, the Occupying Power must not detain protected persons in an area "particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand". By virtue of paragraph 4, furthermore, the Protecting Power must be notified of any evacuations.

62. Article 51 (7) of Protocol I 60/ (which applies in situations of inter-State armed conflict) protects civilians against being compelled to leave their residence in order to disrupt the movement of combatants or to shield military objectives from attack. However, paragraph 7 does not prohibit measures "to restrict the movement of civilians so as to avoid their interference with military movement, nor does it prohibit ordering their evacuation if their security or imperative military reasons so demand". 61/

In fact, article 58 of Protocol I provides that "[w]ithout prejudice to Article 49 of the Fourth Convention" the parties shall "endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives". Measures for evacuating children are found in article 78 (1) of Protocol I. This article sets forth requirements for parental or others' consent to evacuation and detailed procedures for identifying children to be evacuated in a manner which should facilitate return to their families and country.

63. Article 147 of the Fourth Geneva Convention provides, inter alia, that the unlawful transfer or confinement of protected persons constitutes a grave breach of the Convention and shall entail individual criminal responsibility. The ICRC Commentary to this provision explains that the article refers to "breaches of the provisions of articles 45 and 49". It goes on to suggest that "provisions doubtless do exist in the national penal codes which would enable these breaches to be punished by analogy: coercion or deprivation of personal liberty are quite common examples, but in this particular case the coercion is exercised by the authorities and it is not, therefore, easy to deal with it by analogy with offences against ordinary law. These breaches should therefore be the subject of special provisions". 62/

64. In addition, article 85 (4) (a) of Protocol I typifies the wilful "... transfer of all or parts of the population of the occupied territory within ... this territory, in violation of Article 49 of the Fourth Convention" as a grave breach of the Protocol.

65. The Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY) (S/25704, annex) in article 2 (entitled "Grave breaches of the Geneva Conventions of 1949) explicitly refers to "unlawful ... transfer" as a crime over which the Tribunal has competence. The Statute of the International Tribunal for Rwanda (ICTR), contained in the annex to Security Council resolution 955 (1994), in article 4 provides that the ICTR will have jurisdiction over serious violations of common article 3 of the Geneva Conventions and of Protocol II. 63/

66. Article 4 of the statute of ICTY and article 3 of the statute of ICTR define as "genocide" the forcible transfer of children of one national, ethnical, racial or religious group to another.

67. With regard to the protection of civilian populations in armed conflicts, General Assembly resolution 2675 (XXV) of 9 December 1970 affirms that such populations or their members should not be the object of "reprisals, forcible transfers or other assaults on their integrity". Draft article 20 of the draft code of crimes against the peace and security of mankind, in the text adopted at the second reading in 1996, entitled "War crimes", includes in paragraph (a) "... unlawful ... transfer ... of protected persons".

68. There is wide consensus that the key provisions of the four Geneva Conventions and the two Additional Protocols have acquired the status of rules of general or customary international law binding on all States. 64/ In the case of non-international armed conflicts, for instance, while common

article 3 does not explicitly prohibit attacks against civilian populations, such attacks are, nevertheless, prohibited by customary law, in particular as reflected in United Nations General Assembly resolution 2444 (XXIII) of 19 December 1968, entitled "Respect for Human Rights in Armed Conflict".

69. Furthermore, resolution 2444 (XXIII) expressly recognizes the customary principle of civilian immunity and its complementary principle requiring warring parties to distinguish civilians from combatants at all times. The preamble to this resolution clearly states that these fundamental humanitarian law principles apply "in all armed conflicts", meaning both international and internal armed conflicts. Forced displacement caused by a violation of the principles of immunity and distinction of civilians is thus illegal.

E. Prohibition of religious and racial discrimination

70. A particularly serious type of forced movement is the one whereby individuals and groups are subjected to actions intended to remove them from their area of habitual residence on grounds such as race, colour, religion, culture, descent, or national or ethnic origin. A specific group may be determined as posing a threat that "justifies" even extreme measures like apartheid or separation of groups or persons along ethnic lines. In recent years forced movement of persons has often become the objective of policies of ethnic separation or homogenization as well as the aim of military campaigns to achieve "ethnic cleansing".

71. With regard to such displacements, and despite the absence in international human rights law of explicit legal provisions to that effect, it is clear that they are prohibited under international law, 65/ in particular under article 26 of the ICCPR, 66/ the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on the Suppression and Punishment of the Crime of Apartheid (in particular article II (d)).

72. If, however, the internal forcible movement of persons is based on reasonable and objective criteria, and not targeted at any specific group or person on invidious discriminatory grounds, it may not be prohibited. The decisive question, ultimately requiring an examination on a case-by-case basis by weighing all relevant circumstances, is whether a specific distinction between various persons or groups of persons, who find themselves in a comparable situation, is based on unreasonable and subjective criteria. The principle of proportionality is also relevant here. Internal population transfers, or internal displacement of large numbers of persons may be prima facie discriminatory. 67/

73. "Ethnic cleansing" is never admissible. The Committee on the Elimination of Racial Discrimination in its concluding observations on the report of the Republic of Bosnia and Herzegovina (CERD/C/247/Add.1), condemned "ethnic cleansing" because it constitutes "a grave violation of all basic principles underlying the International Convention on the Elimination of All Forms of Racial Discrimination". 68/

F. Prohibition of genocide

74. Certain forms of forced removal, in particular in the context of "ethnic cleansing" or extreme suppression of ethnic or indigenous peoples (e.g. in the case of apartheid) may amount to genocide. Genocide constitutes an especially grave form of violation of the right to life, as discussed in detail in the Compilation and Analysis of Legal Norms (paras. 73-74). Article I of the Genocide Convention 69/ recognizes genocide, committed at any time, to be an international crime. 70/ Article II of the Genocide Convention defines genocide as

> "... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:
>
> "(a) Killing members of the group;
>
> "(b) Causing serious bodily or mental harm to members of the group;
>
> "(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> "(d) Imposing measures intended to prevent births within the group;
>
> "(e) Forcibly transferring children of the group to another group."

III. LAW RELATING TO INDIGENOUS PEOPLES

75. Legal protections against removal from the home and environment have been specifically adopted in ILO Convention No. 169, concerning Indigenous and Tribal Peoples in Independent Countries. Article 16 of the Convention provides:

> "1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
>
> "2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
>
> "3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist."

76. Convention No. 169 replaced ILO Convention No. 107 (and accompanying Recommendation No. 104), which contained a similar provision in article 12. 71/

77. With regard to alternative resettlement and compensation, article 16 of Convention No. 169 provides:

> "4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
>
> "5. Persons thus relocated shall be fully compensated for any resulting loss or injury."

78. The Sub-Commission, by its resolution 1994/45, adopted a draft United Nations Declaration on the Rights of Indigenous Peoples (E/CN.4/Sub.2/1994/2/Add.1) which, in article 7, provides that:

> "Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:
>
> "...
>
> "(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights; ..."

while article 10 stipulates that

> "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."

and article 11 that

> "Indigenous peoples have the right to special protection and security in periods of armed conflict.
>
> "States ... shall not:
>
> "...
>
> "(c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes; ... ."

79. Strong protections of land rights have been recognized with respect to indigenous peoples. ILO Convention No. 169 deals in articles 13-19 with land issues in relation to indigenous and tribal peoples in independent countries. Article 13 (1) of this treaty provides that "[i]n applying the provisions of this Part of the Convention Governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship".

80. Where no formal title to land exists, in which case States may generally use it without any restriction, there may nevertheless be cases where they are obliged to recognize and protect tenure. Convention No. 169, in article 14, requires recognition of ownership and possession rights of indigenous and tribal peoples over lands which they traditionally occupy.

81. Rights to natural resources pertaining to these lands must also be protected, as provided for in article 15 of Convention No. 169.

82. Land rights have thus gained greater recognition in the case of indigenous peoples, than in the case of other groups. 72/ In addition to indigenous peoples and minorities, peasants or pastoralists may need stronger guarantees for their uninterrupted and unrestricted access to the lands they occupy, given their great dependency on the land for subsistence and welfare purposes.

83. Finally, ILO Convention No. 169 requires the establishment by law of penalties for unauthorized intrusion upon or use of the lands of the peoples concerned, and measures by Governments to prevent such offences.

IV. CONCLUSIONS AND RECOMMENDATIONS

84. An express prohibition of arbitrary displacement is contained only in international humanitarian law and in the law relating to indigenous peoples. In general human rights law, by contrast, this prohibition is only implicit in various provisions, in particular the right to freedom of movement and choice of residence, freedom from arbitrary interference with one's home and the right to housing. These rights, however, do not provide adequate and comprehensive coverage for all instances of arbitrary displacement, as they do not spell out the circumstances under which displacement is permissible. In addition, they are subject to restrictions and derogation.

85. The lack of a comprehensive de lege lata rule in international human rights law on the forced movement of persons has resulted in an unclear understanding as to its status in international law. The Sub-Commission, for instance, has raised the question "whether there is a right, enjoyed by individuals and groups, not to be subjected to passive or induced population transfer, either as participants or as recipients". 73/ It has also resulted in the matter not featuring much in the deliberations of the United Nations human rights treaty bodies.

86. Nevertheless, an analysis of the international law referred to above, as well as other international legal provisions, in particular human rights norms

such as the protection of life and personal security, property and non-discrimination, and environmental law, demonstrates that displacement of persons should not be discriminatory and may be undertaken exceptionally and only in the specific circumstances provided for in international law, with due regard for the principles of necessity and proportionality. Displacement should last no longer than absolutely required by the exigencies of the situation. Displacement caused by, or which can be reasonably expected to result in genocide, "ethnic cleansing", apartheid and other systematic forms of discrimination, or torture and inhuman and degrading treatment is absolutely prohibited and might entail individual criminal responsibility of the perpetrators under international law.

87. Prior to carrying out any displacement, authorities should ensure that all feasible alternatives are explored in order to avoid, or at least minimize, forced displacement. In cases of relocations, the provision of proper accommodation and satisfactory conditions of hygiene, health, safety and nutrition should be guaranteed; members of the same family should not be separated. It should normally be expected that individual reviews of each case are conducted and individual, as opposed to collective, administrative actions issued by authorities empowered specifically by law to that effect, with the limited exception of genuine emergencies, where the evacuation of whole groups of persons concerned is necessary or even imperative. Persons to be displaced should have access to adequate information regarding their displacement, and the procedures of compensation and relocation, as well as effective remedies, and, where appropriate, compensation for loss of land or other assets. Efforts should be made to obtain the free and informed consent of those to be displaced. Where these guarantees are absent, such measures would be arbitrary and therefore unlawful. Special protection should be afforded to indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

88. It is necessary to define explicitly what is at present inherent in international law - a right to be protected against arbitrary displacement. In particular, this should specify the impermissible grounds and conditions of displacement, and the minimum procedural guarantees that should be complied with should displacement occur (requirements of "substantive and procedural due process"). 74/

Notes

1/ See The human rights dimensions of population transfer, including the implantation of settlers. Progress report prepared by Mr. Awn Shawhat Al-Khasawneh, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1994/18).

2/ The Commission on Human Rights and the General Assembly have for a number of years adopted resolutions entitled "Human rights and mass exoduses". In the latest resolution 1997/75 of 18 April 1997, for instance, the Commission recalled its previous relevant resolutions, as well as those of the General Assembly, and the conclusions of the World Conference on Human Rights, which recognized that gross violations of human rights, including in armed conflicts, are among the multiple and complex factors leading to displacement.

3/ Article 22 of the Hague Regulations of 1907 concerning the Laws and Customs of War on Land, which reflects customary law, states that the methods and means of warfare are not unlimited, while article 23 prohibits the use of poison or poisoned weapons (para. (a)) and the use of "arms ... calculated to cause unnecessary suffering" (para. (e)). By stating that "the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited", General Assembly resolution 2444 (XXIII) of 17 December 1968 also implicitly prohibits methods of combat that cause superfluous suffering during internal armed conflict. See note 76 below.

4/ These principles are reflected in a number of instruments regulating the use of certain weapons. The Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (Gas Protocol), for instance, prohibits the use of certain chemical and biological weapons during armed conflict between two contracting parties. Although the Gas Protocol applies to the conduct of hostilities by States parties, its basic prohibitions, which implement the customary law principle of humanity, should be regarded as applying without distinction to all armed conflicts.

Another instrument, the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Biological Weapons Convention), prohibits the development, production, stockpiling, acquisition or retention of biological and toxin weapons and provides for their destruction. The use of such weapons by a State party in any kind of armed conflict would obviously constitute a flagrant violation of this instrument.

Finally, under the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention), States parties undertake never under any circumstances to use or produce chemical weapons. Although applying, strictly speaking, only to States, arguably the use of chemical weapons by any party to an internal armed conflict against persons within national territory is prohibited. See note 75 below. For further references see American Society of International Law and International Human Rights Law Group, "Internally displaced persons and international law: a legal analysis based on the needs of internally displaced persons" 1995, pp. 34-37.

5/ See also the non-discrimination clauses in regional instruments: article 14, European Convention on Human Rights; article II, American Declaration on the Rights and Duties of Man; articles 1 and 24, American Convention on Human Rights; article 3, Additional Protocol to the American Convention; articles 2, 3 and 18, para. 3, African Charter on Human and People's Rights.

6/ Human Rights Committee, General Comment No. 23 (50) para. 4, Official Records of the General Assembly, Forty-ninth session, Supplement No. 40, (A/49/40), annex V.

7/ See, e.g., Human Rights Committee, General Comment No. 18 (37), para. 6, applying this type of definition to the ICCPR by reference to, inter alia, the definitions found in the International Convention on the Elimination of All Forms of Racial Discrimination (art. 1) and the Convention on the Elimination of All Forms of Discrimination against Women (art. 1) Official Records of the General Assembly, forty-fifth session, Supplement No. 40 (A/45/40), annex VI. Reprinted in "Compilation of general comments and general recommendations adopted by human rights treaty bodies" (HRI/GEN/1/Rev.1).

8/ See General Comment No. 18, ibid.

9/ This provision does not provide for an evacuation exception.

10/ The establishment of settlers in occupied territory may be a war crime under the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The Convention in article I defines war crimes and crimes against humanity with reference to the Charter of the International Military Tribunal of Nürnberg (which defines "deportation ... of civilian population ... in occupied territory" as a war crime). The preamble to the same Convention also refers to later General Assembly resolutions, in particular resolution 2184 (XXI) which expressly condemned as crimes against humanity the violation of "the economic and political rights of the indigenous population by the settlement of foreign immigrants in the Territories [under Portuguese administration]".

11/ Article 29 (2) of the Universal Declaration of Human Rights.

12/ See Compilation and Analysis of Legal Norms, paras. 180-220 and 285-322.

13/ World Bank Operational Directive No. 4.30 8, para. 8 (29 June 1990); see also, Organization for Economic Cooperation and Development, Guidelines for Aid Agencies on Involuntary Displacement and Resettlement. Doc. OECD/GD (91) 201 (1991).

14/ These guidelines set out the following issues as primary policy considerations to be taken into account in designing projects: (a) involuntary resettlement should be avoided or minimized where feasible, exploring all viable alternative project designs (e.g. realignment of roads or reductions in dam height); (b) where displacement is unavoidable, resettlement plans should be developed; all involuntary resettlement should be conceived and executed as development programmes, with resettlers provided sufficient investment resources and opportunities to share in project benefits, compensation for their losses, assistance with the move and support during the transition period, and assistance in their efforts to improve their former living standards, or at least restore them; particular attention should be paid to the needs of the poorest groups to be resettled; (c) community participation in planning and implementing resettlement should be encouraged and appropriate patterns of social organization should be established, and existing social and cultural institutions of resettlers and their hosts should be supported and used to the greatest extent possible; (d) resettlers should be integrated socially and economically into host communities so that adverse impacts on host communities are minimized; the best way of achieving this integration is for resettlement to be planned in areas benefiting from the project and through consultation with the future host; and (e) land, housing, infrastructure and other compensation should be provided to the adversely affected population, indigenous groups, ethnic minorities and pastoralists who may have usufruct or other resources taken for the project; the absence of legal title to land by such groups should not be a bar to compensation. In particular, provision for the following elements must be included in any plans for development projects that entail involuntary resettlement: organizational responsibility, community participation and integration with the host population, socio-economic survey, legal framework, alternative sites and relocation, valuation of and compensation for lost assets, land tenure, acquisition and transfer; access to training, employment and credit; shelter, infrastructure and social services; environmental protection and management; implementation, monitoring and evaluation.

15/ See, e.g., World Bank Operational Directive 4.01 on Environmental Assessment, and accompanying Annexes (October 1991). See also Committee on Economic, Social and Cultural Rights, General Comment No. 2 (1990) on international technical assistance measures (art. 22 of the Covenant), HRI/GEN/1/Rev.1

16/ General Comment No. 2, ibid., paras. 6 and 8 (d).

17/ See also the draft code crimes against the peace and security of mankind of the International Law Commission, Official Records of the General Assembly, Fifty-first session, Supplement No. 10, (A/51/10), chap. II, which has included in draft article 20 (war crimes) the use of methods of warfare "not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs".

18/ See Michel Veuthey, Guérilla et droit humanitaire (2e édition) Comité international de la Croix-Rouge, Genève, (1983).

19/ See Christopher McDowell, Understanding Impoverishment: The Consequences of Development-Induced Displacement, Oxford, Berghahn Books, 1996.

20/ See also International Committee of the Red Cross, Commentary to the Fourth Geneva Convention, at 35, infra at note 59.

21/ Article 9 of the Universal Declaration prohibits the arbitrary exile of any person. A United Nations study on the right of everyone to be free from arbitrary arrest, detention and exile in 1964 interpreted the term to encompass also internal exile (or banishment) (E/CN.4/826/Rev.1), p. 203. The study indicated that banishment within a country is a much more frequent occurrence than expulsion or external exile in law or in practice in a considerable number of countries, where it is applied either as a penal sanction or as a preventive or security measure of banishment. The study concluded that "the perpetual banishment to a remote place ... appears to be on the decline". Under modern day standards the measures of banishment may not be imposed arbitrarily. Banishment "as a penalty under criminal law ... should not be imposed on any person except pursuant to a decision of a competent court and in accordance with proper criminal procedure, and the right to appeal to a higher court ... should be guaranteed". Finally, "the grounds on which such measure may be taken should be specific or precisely defined".

22/ The right is guaranteed under the ICCPR and the Protocol No. 4 to the European Convention for "[e]veryone lawfully within the territory of a State". The American Convention guarantees the right for "[e]very person lawfully in the territory of a State Party".

23/ The right to be free from racial discrimination in exercising the freedom of movement and residence within the borders of one's own State is guaranteed in article 5 (d) (i) of the International Convention on the Elimination of All Forms of Racial Discrimination.

24/ The Siracusa Principles on the Limitation and derogation Provisions in the International Covenant on Civil and Political Rights, Human Rights Quarterly., Vol. 7, No. 1, February 1985, pp. 3-14.

25/ Manfred Nowak, United Nations Covenant on Civil and Political Rights - CCPR Commentary, 1993, p. 208.

26/ Ibid., p. 209.

27/ Ibid., pp. 210 and 214, where he cites relevant case law of the Human Rights Committee: Mpaka-Nsusu v. Zaire, Communication No. 157/1983, and Ngalula Mpandanjila v. Zaire, Communication No. 138/1983. At note 92, he notes a general concern of the Committee at banishment, which has been confirmed in Birindwa and Tshisekedi v. Zaire, Communication Nos. 241 and 242/1987.

28/ Ibid., p. 211.

29/ Ibid.

30/ Ibid.

31/ Public order (ordre public), "may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded". Siracusa Principles, op. cit., para. 22.

32/ Reasons of public health or public order are also required to restrict the movement of asylum seekers who have been temporarily admitted pending arrangements for a durable solution. See United Nations High Commissioner for Refugees, Executive Committee Conclusion No. 22 (XXXII), Protection of Asylum Seekers in Situations of Large-Scale Influx (1981). Concerning the relocation of indigenous peoples, see the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169).

33/ Nowak, op. cit., p. 216.

34/ Sandra Lovelace v. Canada, Communication No. 24/1977, (formerly R.6/24). Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), annex XVIII.

35/ OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, Addis Ababa, September 1994, recommendation 13. See also CSCE Concluding Document of the Vienna Meeting on the Follow-up to the Conference, 15 January 1989, reprinted in Council of Europe, Human Rights in International Law: Basic Texts (Strasbourg, 1991), para. 20 (right of movement and residence within borders of each State); San José Declaration on Refugees and Displaced Persons of 7 December 1994, sixteenth conclusion, para. (d).

36/ International Law Commission, op. cit., chap. II.D.

37/ See also article 1 (d) on war crimes and crimes against humanity of the draft consolidated text of the Preparatory Committee on the establishment of an international criminal court, (A/AC.249/1997/WG.1/CRP.5 and Corr.1) (20 February 1997), including "forcible transfer of population" as meaning movement for a purpose contrary to international law without lawful justification.

38/ Nowak, op. cit., p. 302.

39/ Ibid., p. 303.

40/ See also application No. 21893/93 to the European Commission on Human Rights, Akdivar et al. v. Turkey.

41/ Nowak, op. cit., p. 293.

42/ See HRI/GEN/1/Rev.3.

43/ Nowak, op. cit., p. 290.

44/ General Comment No. 4, para. 18, HRI/GEN/1/Rev.3. See also General Comment No. 7 (1997) (E/C.12/1997/4).

45/ In addition, see also Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendations No. 21, para. 9 where, in commenting on the right to equality of women with men before the law, the Committee has emphasized a woman's right to choose her domicile at will regardless of marital status. HRI/GEN/1/Rev.3.

46/ Also see the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, General Assembly resolution 3318 (XXIX) of 14 December 1974, paragraph 5, according to which "[a]ll forms of repression and cruel and inhuman treatment of women and children, including ... forcibl eviction, committed by belligerents in the course of military operations or occupied territories shall be considered criminal".

47/ Commission on Human Rights resolution 1993/77 of 10 March 1993. See also Agenda 21, chapter 7, Sub-Commission resolutions 1995/29 of 24 August 1993, Commission on Human Settlements resolution 14/6, adopted 5 May 1993.

48/ See article 4 (1) of the ICCPR.

49/ The Inter-American Commission on Human Rights, in the Miskito case, justified the relocation of the Miskito Indians on the basis of the situation of emergency and the military measures that were essential to overcome attacks by armed bands in Nicaragua. Given that the Miskitos inhabited an area in which military operations were necessary, their relocation was also a protective measure. Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/II.62, doc. 10-rev.3, 1983.

50/ Ibid.

51/ Al Khasawneh, op. cit.

52/ See also Compilation and Analysis of Legal Norms, paras. 21-23.

53/ The Declaration on Minimum Humanitarian Standards, adopted by an expert meeting convened in Turku in 1990, which has been circulated to the members of the Commission pursuant to its resolution 1995/29, in its article also reads as follows:

"1. All persons have the right to remain in peace in their homes and their places of residence.

"2. The displacement of the population or parts thereof shall not be ordered unless their safety or imperative security reasons so demand. Should such displacement have to be carried out, all possible measures shall be taken in order that the population may be transferred and received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. Persons or groups thus displaced shall be allow to return to their homes or their places of residence as soon as the conditions which made their displacement imperative have ceased. Ever

effort shall be made to enable those so displaced who wish to remain together to do so. Families whose members wish to remain together must be allowed to do so. The persons thus displaced shall be free to move around in the territory, subject only to the safety of the persons involved or reasons of imperative security.

"No person shall be compelled to leave their own territory."

(E/CN.4/Sub.2/1995/116, annex, and revised at a meeting in Oslo on 29-30 September 1994, published in American Journal of International Law, Vol. 89, 1995, pp. 219-223.)

54/ See ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987, p. 1472.

55/ Ibid., pp. 1472-1473.

56/ Ibid., p. 1473.

57/ According to article 4, "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".

58/ The principle of military necessity at a time of occupation, when military activities stricto sensu for the most part have ceased, means that they cannot relate to anything else but the security of the forces of occupation. See Christa Meindersma, "Legal Issues Surrounding Population Transfers in Conflict Situations", in Netherlands International Law Review, Vol. 41, No. 31, 1994, pp. 45-58.

59/ ICRC, Commentary to the Fourth Geneva Convention, 1958, p. 281.

60/ Article 51 (7) of Protocol I reads: "The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations". Article 51 belongs to Part IV of the Protocol, which defines a different scope of application than the Fourth Geneva Convention, namely that those of the Protocol's provisions that apply to "attacks" shall apply "to all attacks in whatever territory conducted" (art. 49, para. 2).

61/ M. Bothe et al., New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, The Hague and Boston, M. Nijhoff, 1982, p. 317.

62/ ICRC Commentary to the Fourth Geneva Convention, op. cit., p. 599.

63/ See also A/AC.249/1997/WG.1/CRP.5.

64/ See Compilation and Analysis of Legal Norms, para. 22. See also Prosecutor v. Tadic, Case No. IT-94-1-AR72, appeal on jurisdiction, 2 October 1995, in 35 ILM 32, para. 127, 1996.

65/ This is true, naturally, for both citizens and non-citizens, in contrast to expulsions and deportations, where, in principle, expulsion of aliens does not discriminate against them vis-à-vis nationals.

66/ Human Rights Committee, General Comment No. 18, HRI/GEN/1/Rev.1.

67/ This point has been convincingly argued with regard to collective expulsions. See Jean-Marie Henckaerts, Mass Expulsion in Modern International Law and Practice, Martinus Nijhoff, 1955, p. 47. See also article 12 (5) of the African Charter on Human and Peoples' Rights.

68/ Report of the Committee on the Elimination of Racial Discrimination, Official Records of the General Assembly, Fiftieth Session, Supplement No. 18 (A/50/18), para. 219.

69/ It is beyond doubt that the Genocide Convention has gained acceptance as being customary international law. See Security Council document S/25704 and Add.1 (1993).

70/ In this regard, article 6 (3) of the ICCPR states that "[w]hen deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide".

71/ Both Conventions have been criticized for lack of specificity with regard to the legal basis for the displacement of indigenous peoples.

72/ See for instance, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly resolution 47/135 of 18 December 1992, which makes no reference to land concerns. See also Minority Rights Group International, Land Rights and Minorities, 1995.

73/ The human rights dimensions of population transfers: preliminary working paper submitted by Ms. Claire Palley (E/CN.4/Sub.2/1992/WP.1).

74/ Nowak, op. cit., p. 303.